Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

BARBARA RINGER, in her capacity as Acting Register of Copyrights, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a panel of a court of appeals is free to disregard the *stare decisis* effect, recognized by this Court in *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992), of a prior panel decision independently interpreting a federal statute solely on the basis of a federal agency's intervening rule adopting a contrary interpretation of the same statutory language.

PARTIES TO THE PROCEEDING

The following entities were named plaintiffs in this action:

Satellite Broadcasting & Communications Association of America
Southern Satellite Systems
Netlink, USA
Eastern Microwave, Inc.
Primetime 24
Superstar Connection (United Video)

The following entities were named defendants in this action:

The United States
The Copyright Office of the Library of Congress

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Satellite Broadcasting & Communications Association of America is a not-for-profit trade association and has no parent company or subsidiaries.

Southern Satellite Systems and Netlink, USA are not participants in this petition for a writ of certiorari.

Newhouse Broadcasting Corp. is the parent company of Eastern Microwave, Inc., which has no wholly owned subsidiaries.

PrimeTime 24 is a joint venture of American Satellite Network, Inc., Satellite Broadcast Networks, Inc., and PrimeTime Relay Corp., and has no subsidiaries.

Superstar Satellite Entertainment, a division of United Video Satellite Group, Inc., is the successor of Superstar Connection (United Video).

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PETITION FOR A WRIT OF CERTIORARI

Satellite Broadcasting & Communications Association of America ("SBCA"), Eastern Microwave, Inc., Prime-Time 24, and Superstar Satellite Entertainment ("petitioners"), hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a-9a) is reported at 17 F.3d 344. The opinion of the United States District Court for the Northern District of Georgia (App. 10a-16a) is reported at 26 U.S.P.Q.2d 1313.

JURISDICTION

The decision and judgment of the court of appeals was entered on March 24, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Copyright Act, 17 U.S.C. § 101 *et seq.*, provides in relevant part:

> [S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station . . . shall be subject to compulsory licensing.

17 U.S.C. § 111(c)(1).

In relevant part, the Copyright Act defines "cable system" for purposes of the Section 111(c)(1) compulsory license as follows:

> A "cable system" is a facility, located in any State, Territory, trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service.

17 U.S.C. § 111(f).

STATEMENT OF THE CASE

A. Factual Background

The Satellite Carrier Industry: Petitioners are the Satellite Broadcasting and Communications Associations of America ("SBCA") and certain of its members. SBCA is the satellite industry trade association, and its members include satellite carriers, programmers, distributors, satellite manufacturers and operators, equipment manufacturers, and retail dealers.

Satellite carriers provide a broad range of television programming to consumer households, particularly those in sparsely populated and rural communities which would not otherwise be served by cable television. Many satellite service subscribers live in areas of the United States where there is no traditional wired cable operator. In many such areas, it simply is not economically feasible to run wires to each individual home. In those areas, satellite carriers provide the service that wired cable operators otherwise would provide, by relying on retransmission of signals by satellite, instead of by wires or cables.

In addition, satellite carriers provide a competitive alternative to local cable operators. More than 99 percent of the households in the United States have access to no more than one local cable operator. But satellite carriers can provide service to all markets and thus have the ability to provide essential competition to local cable operators that otherwise is unavailable. Satellite carriers transmit virtually the same programming as local cable operators, with the only difference being the technology used to transmit the signal.[1]

The Section 111 Compulsory License: Under the copyright laws prior to 1976, satellite carriers would have had no liability to copyright owners for their retransmissions of broadcast signals. See *Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 407-09 (1974) (holding that retransmissions were not "performances" within the meaning of the 1909 Copyright Act). In the Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at

[1] In essence, satellite carriers receive signals broadcast by television stations or from other sources and then retransmit those signals via satellite to owners of home satellite dishes. *See Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F.2d 125, 128 (2d Cir. 1982). Satellite carriers maintain receiving antennas on the ground and utilize ground-based uplink facilities in making the retransmissions. The signals are scrambled by the carriers and can be viewed only by home satellite dish owners who have obtained descrambling devices and who pay a monthly fee.

17 U.S.C. § 101 *et seq.*) ("Copyright Act"), however, Congress extended limited copyright protection to broadcasts retransmitted by "cable systems" and, at the same time, made those retransmissions subject to compulsory licensing under the Copyright Act. 17 U.S.C. § 111(c).

Under the Section 111 compulsory license, a "cable system" has an absolute right to retransmit broadcasts, subject to the filing of a statement of account and the payment of royalty fees, see 17 U.S.C. § 111(d)(1)(A)-(D), (2), and (3), so long as it does not delete or alter commercial advertising on the broadcasts, *id.* § 111(c)(3). The Act broadly defines a "cable system" as:

> a facility, located in any State . . . [that] receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals or programs by wires, cables, *or other communications channels* . . . .

17 U.S.C. § 111(f) (emphasis added). In reliance on this statutory definition, satellite carriers acted in accordance with the requirements of Section 111(d) and filed statements of account and deposited royalty fees with the Copyright Office in 1987 and 1988.[2]

The NBC v. *Satellite Broadcast Networks Decision:* In 1987, the National Broadcasting Company ("NBC") and several of its affiliates filed suit against Satellite Broadcast Networks ("SBN"), the predecessor of Prime-

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[2] Congress created a compulsory license for "cable systems" in recognition of the fact that "it would be impractical and unduly burdensome to require every cable system to negotiate [royalty payments] with every copyright owner." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89-90 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704; *see also Eastern Microwave*, 691 F.2d at 132 (rejecting proposed construction of Copyright Act because it "would defeat Congress' intent by imposing on [a satellite carrier] the unworkable separate negotiations with numerous copyright holders from which the Act sought to free [cable] systems").

Time 24, one of the petitioners here. NBC and its affiliates alleged that SBN had "infringed NBC's exclusive rights in copyrighted work by rebroadcasting" NBC's copyrighted programs. *NBC* v. *Satellite Broadcast Networks, Inc.*, 940 F.2d 1467, 1468 (11th Cir. 1991) (footnote omitted) ("*SBN*") (App. 17a-25a), App. 18a. SBN's defense was that it had not infringed those copyrights because its rebroadcasts were licensed pursuant to the Section 111 compulsory license. The district court granted summary judgment for NBC, holding that SBN was not a "cable system" within the meaning of Section 111(f) and therefore was not eligible for the compulsory license. The district court reasoned that because SBN was not "located entirely within a single state," it did not fit the statutory definition of a "cable system." See *SBN*, App. 20a, *supra* p. 2.[3]

The Eleventh Circuit reversed, holding that "SBN is a cable system as defined under § 111 whose secondary transmissions were permissible under FCC rules and reg-

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[3] In response to the district court decision—the first decision to address the question whether a satellite carrier was a "cable system"—Congress enacted the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (codified at 17 U.S.C. § 119) ("SHVA"). SHVA creates a compulsory license specifically for satellite carriers, 17 U.S.C. § 119(a), and suspends any rights satellite carriers have under § 111 as long as SHVA is in effect, *id.* § 119(e). SHVA took effect on January 1, 1989, *id.* § 119 Note, and by its terms "cease[s] to be effective on December 31, 1994." *Id.* In enacting SHVA, Congress made clear that nothing in SHVA "is intended to reflect any view as to the proper interpretation of section 111 of this title prior to enactment of this Act, or after this Act ceases to be effective on December 31, 1994," H.R. Rep. No. 887, 100th Cong., 2d Sess. 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5611, 5630.

Because SHVA does not cover the years prior to 1989 and because SHVA will expire by its own terms at the end of this year, the availability of the compulsory license contained in § 111 continues to be crucial to satellite carriers. Indeed, this issue becomes a matter of increasing concern with each passing day.

ulations." *SBN*, App. 25a. Based upon its review of the language and structure of the cable compulsory license provisions, the court of appeals was "unpersuaded that 'located in any State' means located entirely within a single state." *Id.* at 22a. Moreover, "nothing in the words Congress chose counsel that only local cable companies be included" under Section 111. *Id.* The court also "considered the views of the Copyright Office [in its 1991 statement] on the language and legislative history of § 111," as expressed in its then-ongoing rulemaking on this issue (see *infra* pp. 6-7), but it found those views "unpersuasive." *Id.* at 20a n.4. Accordingly, the court held that SBN, as a satellite carrier, was a "cable system" for purposes of Section 111(f), and the court therefore concluded that the rebroadcast by SBN "infringed no copyright." *Id.* at 25a.

The Copyright Office Rulemaking: At the same time that the *SBN* litigation was proceeding, the Copyright Office expanded a pending rulemaking to consider the question whether "a satellite carrier . . . is a 'cable system' eligible for a cable compulsory license pursuant to section 111." Extension of Comment Period; Inquiry of Definition of Cable Systems, 53 Fed. Reg. 17,962 (1988). After receiving comments, the Copyright Office issued a statement on July 11, 1991, in which the Office stated that it was "inclined to agree" with the conclusion of the district court in *SBN* that the statutory term "cable system" in Section 111(f) did not include satellite carriers. Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,590-91 (1991).[4]

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[4] The panel of the Eleventh Circuit in *SBN* noted in passing that the Copyright Office had issued this statement after oral argument had been held. *SBN*, App. 20a n.4. The court noted that this definition did not apply retroactively, and in any event the interpretation of the Copyright Office was "unpersuasive." Since the Copyright Office's promulgation was not before the court on review, the court, of course, expressed no opinion as to the definition's validity.

After the Eleventh Circuit reversed the district court's decision in *SBN*, the Copyright Office "reconsidered" its previous position. Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284 (1992). On reconsideration, the Copyright Office expressly rejected the Eleventh Circuit's interpretation of Section 111(f) in *SBN* and promulgated a final rule interpreting Section 111(f) to exclude satellite carriers from the definition of "cable systems." *Id.* at 3296; 37 C.F.R. § 201.17(k). The Copyright Office made clear that its disagreement with the Eleventh Circuit on the proper construction of the statute was based solely on its own reading of the "definitional requirements" of Section 111(f) and not upon consideration of any "public policy objectives." 57 Fed. Reg. at 3292.

B. Proceedings Below

Petitioners filed the present action under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, challenging the Copyright Office's final rule on the definition of "cable systems" under Section 111(f) as contrary to law. The parties filed cross-motions for summary judgment, and the case was submitted to the district court on the undisputed facts.

The district court held in favor of petitioners and entered judgment declaring the Copyright Office rule invalid. The court reasoned that because the Eleventh Circuit had already interpreted the meaning of Section 111(f) in *SBN*, the panel's prior interpretation of the statute was binding as a matter of *stare decisis*. App. 14a-16a. The district court held that it would not "reconsider a question already resolved by a previous opinion issued by its own appellate court." *Id.* at 16a. Because "the regulation issued by the Copyright Office clearly conflicts" with the Eleventh Circuit's determination that a satellite carrier is a cable system within the meaning

of Section 111, the district court concluded that "principles of *stare decisis* require this court to set aside the regulation of the Copyright Office." *Id.* at 14a.

The Copyright Office filed an appeal and chose to submit the case to a panel of the Eleventh Circuit rather than to the full court for *en banc* review. The panel reversed, holding that "[a]lthough the new regulations conflict with our interpretation of [Section 111(f)] . . . [t]hey are . . . [a] valid exercise[] of the Copyright Office's statutory authority to interpret the provisions of the compulsory licensing scheme, and are *binding* on this circuit." App. 2a (emphasis added). Although the Eleventh Circuit panel in *SBN* previously had engaged in a *de novo* interpretation of the term "cable system" as used in Section 111(f)—and had rejected the Copyright Office's contrary interpretation as "unpersuasive"—the panel concluded that it was "not precluded from revisiting [its] initial interpretation." *Id.* at 8a. Rather, the court below concluded that under the rule set forth by this Court in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), federal courts "generally must defer to an agency statutory interpretation that is at odds with circuit precedent" as long as the agency interpretation is a "permissible" construction of the statute. App. 6a.

The panel expressly rejected petitioners' argument that it was bound to follow the court's prior interpretation of Section 111(f) in *SBN* pursuant to the rule of *stare decisis* set forth in *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847-48 (1992) ("*Lechmere*"), in which this Court held that once a statute's meaning had been interpreted "we judge an agency's later interpretation of the statute against our prior interpretation." The panel stated that it was not bound by *stare decisis* under *Lechmere*, and held that a "contrary result illogically would wed this circuit to the *SBN* decision, while all other circuits and

the Supreme Court would be bound under *Chevron* to defer to the Copyright Office rule." App. 8a.[5]

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's holding that *Chevron* principles of deference to an agency's interpretation of a statute take precedence over the doctrine of *stare decisis* as applied in *Lechmere* presents an important and recurring issue of federal law. Moreover, the decision below squarely conflicts with decisions in the Second, Fifth and Eighth Circuits that have expressly rejected the argument that a federal court must defer to an agency's interpretation of a statute when that interpretation conflicts with existing circuit precedent. These circuits all have correctly interpreted this Court's decision in *Lechmere* to stand for the proposition that an administrative agency is not free to overrule judicial precedent. Because this Court is currently reviewing one iteration of this rule in *Variable Annuity Life Ins. Co.* v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom.*, 62 U.S.L.W. 3707 (U.S. June 6, 1994), at a minimum, this petition for certiorari should be held pending this Court's decision in *Variable Annuity*.

However, the decision below independently warrants review by this Court because resolution of the underlying issue of statutory interpretation involves matters of profound importance for the satellite broadcasting industry and the public, particularly households in less densely populated areas that are not served by traditional wired cable operators, and others that rely on satellite broadcasts to provide a competitive alternative to traditional

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[5] The panel also noted that the *SBN* decision was not binding under *Lechmere* because the interpretation of Section 111(f) by the *SBN* panel "rested . . . not upon the statute's 'clear meaning,' but rather upon inferences drawn from the statutory scheme and upon our policy determination that satellite carriers should be included for the benefit of their rural customers." App. 7a-8a; *but see infra* note 8.

wired cable service. Under the interpretation of Section 111(f) adopted by the Copyright Office and accepted by the panel below, satellite operators will have to work out individual copyright agreements with each program's copyright holder. See *supra* note 3. At best, if these individual agreements can be worked out, the satellite operators will be at a tremendous economic disadvantage with their competitors, wired cable companies. On the other hand, if these agreements cannot be worked out, the very existence of the satellite broadcasting industry is threatened.

1. This Court repeatedly has held that "any departure from the doctrine of *stare decisis* demands special justification." See, *e.g.*, *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). This is so because "the doctrine . . . is of fundamental importance to the rule of law." *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). *Stare decisis* and its concomitant "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 564 (1991). Moreover, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation," because Congress is free to "alter" what the courts have done with the statutes it has enacted. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

This Court's decision in *Chevron*, 467 U.S. 837, did not undermine the preeminent importance of the doctrine of *stare decisis*.[6] Indeed, this Court in *Chevron* made clear that it is the judiciary, and not an administrative

[6] In *Chevron* this Court fashioned a two-step approach to govern the manner in which courts review an agency's interpretation of a statute it administers pursuant to congressional delegation. 467 U.S. at 843-44. First, the statute is examined to determine if the intent of Congress is clear. If it is, the courts and the agency must abide by that intent. If it is not, then the courts are to defer to the agency's determination. *Id.* The standard of deferential review varies depending on the nature of the congressional delegation. *Id.* at 844-45.

agency, that is "the final authority on issues of statutory construction." 467 U.S. at 843 n.9. Moreover, the Court held that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* This Court in *Lechmere* subsequently made clear that once a court has determined a statute's meaning, " 'under the doctrine of *stare decisis*, [a court must] judge an agency's later interpretation of the statute against [its] prior determination of the statute's meaning.' " 112 S. Ct. at 847-48 (quoting *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)).

The court below, however, rejected this analysis, holding that the Copyright Office's interpretation of Section 111(f) was "binding" on the court. Although a panel of the Eleventh Circuit already had concluded that there was "no good reason" for interpreting the term "cable system" in Section 111(f) to exclude satellite broadcasters, *SBN*, App. 23a, the court below did not apply principles of *stare decisis* in determining whether the Copyright Office's contrary interpretation of Section 111(f) met the first step of the *Chevron* analysis.[7] Instead, the court below

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[7] Not only did the Eleventh Circuit manifestly misapply the first *Chevron* criterion, it also applied the wrong standard of deference when it erroneously reached the second criterion. This Court held that where Congress has *expressly* delegated "authority to the agency to elucidate a specific provision of the statute by regulation" then the court must uphold the interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. Whatever delegation Congress made to the Copyright Office, it did not expressly delegate to the Copyright Office the authority to interpret whether § 111 applies to the satellite broadcasitng industry. *If* application of the *Chevron* criterion had been called for in the case below, the Eleventh Circuit should have used the standard for *implicit* delegation, *i.e.*, a court cannot overturn "a *reasonable* interpretation made by the administrator of an agency." *Id.* at 844 (emphasis added). Because there was "no good reason" to interpret the statute the way it did, the Copyright Office's construction of § 111 was both arbitrary and unreasonable.

concluded that the principles of *stare decisis* set forth by this Court in *Lechmere* are not applicable to the courts of appeals, leaving them free to "revisit [their] initial interpretation" of the statute in light of a subsequent agency interpretation. See App. 8a (reasoning that application of *stare decisis* at the court of appeals level "illogically would wed this circuit to the *SBN* decision while all other circuits and the Supreme Court" would be free to reach a contrary result).[8]

The reasoning of the court below is patently inconsistent with this Court's decisions in *Lechmere* and *Chevron*, which make clear that before a court undertakes to determine whether an agency's interpretation passes muster under the second, deferential step of *Chevron*, it must, as a preliminary matter, determine whether the agency's construction is consistent with Congress' manifest intent embodied in the language of the statute. In making this determination, *Lechmere* instructs that if there is binding

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[8] The Eleventh Circuit also held in the alternative that its departure from the norms of judicial governance was justified because the *SBN* decision did not claim to have discussed the "clear meaning" of § 111. *See supra* note 5. Such a strained explanation of the holding in *SBN* lacks merit. In *SBN*, the Eleventh Circuit, using "traditional tools of statutory construction," determined the meaning of the statute as evinced by the intent of Congress. And that intent—to include cable systems other than traditional wire-based systems within the compulsory license provision of § 111—must be given effect. *See Chevron*, 467 U.S. at 843-44 & n.9.

Even if the *SBN* decision's consideration of congressional intent had not considered the "clear meaning" of § 111, that decision would still be binding precedent until changed by Congress (or the court *en banc* or this Court). For example, in interpreting the "*Machinists* rule" of the National Labor Relations Act—a rule "not set forth in the specific text of an enumerated Section of the NLRA" but nonetheless intended by Congress—this Court held that "[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute," and that only Congress could "retract" such a holding. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 111-12 (1989).

judicial precedent independently construing the plain language of the statute, such precedent must be respected. 112 S. Ct. at 847-48. Thus, the doctrine of *stare decisis* is applicable under the *first*, non-deferential step of the *Chevron* analysis, *see* 112 S. Ct. at 847, and it is this preliminary step that is most important in cases—such as the instant case—involving "pure question[s] of statutory construction." *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 446 (1987).

2. The decision below also is inconsistent with the holding of three other circuits that have flatly rejected the approach taken by the Eleventh Circuit. In *Variable Annuity Life Ins. Co.* v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom.*, 62 U.S.L.W. 3707 (U.S. June 6, 1994), the Fifth Circuit held that it would abide by its previous construction of a provision of the federal banking statutes. The court expressly refused to adopt a subsequent interpretation of that provision by the Comptroller of the Currency, holding that "deference under *Chevron* does not permit administrative agencies to overrule precedents." *Id.* at 1300 (citing *Lechmere*). The Fifth Circuit correctly concluded that "[w]hile administrative agencies serve important functions, these do not include the occlusion of the positivistic declarations of this court." *Id.*[9]

The Second Circuit also has rejected the abdictation of judicial responsibility to follow *stare decisis* employed by

[9] The *Variable Annuity* case may not necessarily be a suitable vehicle for resolving the issue presented in this petition, given that case's underlying banking and insurance industry context. Nevertheless, this Court may affirm that decision on the ground that the panel properly followed the principle of *stare decisis* and thereby not reach the underlying industry issues. Obviously, such a decision would justify a remand in this case. Thus, the Court should hold this petition pending the outcome of *Variable Annuity*. If, however, the Court does not decide the *stare decisis* issue in that case, then the Court should grant certiorari in this case to resolve the circuit conflict.

the Eleventh Circuit in the instant case. In *United States* v. *Palacio*, 4 F.3d 150 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994), the Second Circuit refused to construe the statutory term "cocaine base" in accordance with a guideline subsequently proposed by the Sentencing Commission. The court explained that "once we have construed the statute, we will not reinterpret it in the absence of new guidance from Congress . . . when our initial construction of a statute is solely the result of an independent judicial interpretation of a statutory term. . . ." 4 F.3d at 154 (citing *Lechmere* and *Chevron*).

Finally, the Eighth Circuit also has refused to put aside the doctrine of *stare decisis* in reviewing subsequent statutory interpretations by agencies. In *BPS Guard Servs., Inc.* v. *NLRB*, 942 F.2d 519 (8th Cir. 1991), the NLRB argued that under *Chevron* the circuit's previous interpretation of a statute should be set aside in favor of the agency's subsequent construction of the statutory provision. The court rejected the proffered interpretation, holding that "*Chevron* does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body." *Id.* at 523. The court further noted that "[a]n agency's decision to refuse to follow controlling precedent hardly can be characterized as an exercise of discretion." *Id.*

The Eleventh Circuit's decision below simply cannot be reconciled with these decisions of the courts of appeals in the Second, Fifth and Eighth Circuits. This Court should grant certiorari to resolve this conflict in the circuits regarding the appropriate interplay between principles of agency deference articulated in *Chevron* and the doctrine of *stare decisis*, as set forth in *Lechmere*.

3. The *Chevron-Lechmere* issue is not merely a matter of jurisprudential curiosity. The failure to have a uniform rule in the courts of appeals concerning the proper relationship between *Chevron* and *Lechmere* is a matter of significant practical importance. If the decision of the

Eleventh Circuit holding that *Lechmere* applies exclusively to this Court is allowed to stand, district courts will be placed in the impossible situation of having to guess how the Eleventh Circuit will treat its own prior case law and the rule of law within the circuit will swiftly erode. Every time a district court is presented with conflicting interpretations of a statute by an agency and a panel of the court of appeals, it will be forced to attempt to divine which construction the next panel of the court of appeals will adopt after its "revisitation." Such a task will lead inevitably to repeated failure and the "law of the circuit" will be in perpetual flux. Such a result will impair the ability of litigants and other persons to govern their conduct prospectively in accordance with the law of the circuit. Respect for judicial authority, which is engendered by the stability of court decisions and the predictability that stability creates, will evaporate. These are the precise concerns that led to this Court's decision in *Lechmere* and they demonstrate why the *Lechmere* rule applies with equal force to the lower courts.

Finally, it is neither unusual or inappropriate for a panel of a court of appeals to be bound by a prior decision of the court, despite the suggestion to the contrary by the court below. App. 8a ("[a] contrary result illogically would wed this circuit to [its prior] decision"). *Stare decisis* is the rule and not the exception. And this doctrine applies equally to the courts of appeals, not just this Court.[10] Even if a subsequent panel believes a prior

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[10] *Feliciano-Angulo* v. *Rivera-Cruz*, 858 F.2d 40, 44 n.5 (1st Cir. 1988) ("*stare decisis* requires panels in this circuit to follow circuit precedent"); *In Re Grand Jury Subpoena*, 826 F.2d 1166, 1172 n.3 (2d Cir. 1987) ("a subsequent panel is obliged to follow the precedents established by prior panels of this Circuit"), *cert. denied*, 487 U.S. 1218 (1988); *United States* v. *Monaco*, No. 93-5261, 1994 WL 174898, at *9 (3d Cir. May 10, 1994) ("no panel of this court may overrule the holding of a previous panel"); *Derflinger* v. *Ford Motor Co.*, 866 F.2d 107, 110 (4th Cir. 1989) ("[t]he general rule

decision to be wrong, or even if the decision creates a split of authority among the circuits, existing mechanisms already provide the proper means for rectifying any judicial errors. First, the court of appeals sitting *en banc* can reverse or overturn prior circuit decisions.[11] Second, review can be sought before this Court, whose rules gov-

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in this Circuit is that one panel cannot overrule another panel. . . . *Stare decisis* requires that we follow our earlier determination as to the law") (internal quotations omitted); *Matter of Dyke*, 943 F.2d 1435, 1442 (5th Cir. 1991) ("[i]n this circuit, one panel may not overrule the decision—right or wrong—of a prior panel, absent en banc reconsideration or a superseding contrary decision of the Supreme Court"); *United States* v. *Beal*, 810 F.2d 574, 577 (6th Cir. 1987) ("[i]t is well established in this circuit that once a panel has ruled on an issue, it becomes the law of the circuit and may not be overruled by another panel"); *Haas* v. *Abrahamson*, 910 F.2d 384, 393 (7th Cir. 1990) ("[w]e note that principles of *stare decisis* require that we give considerable weight to [prior decisions of this court] unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments") (internal quotations omitted); *Battle* v. *Delo*, 19 F.3d 1547, 1553 (8th Cir. 1994) ("[a]s a panel we must follow the decisions of another panel as the law of the circuit"); *United States* v. *Washington*, 872 F.2d 874, 880 (9th Cir. 1989) ("[w]e are bound by decisions of prior panels unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions") (internal quotations omitted); *United States* v. *Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990) ("[a]s a panel, we are bound to adhere to prior circuit precedent"); *Myrick* v. *Freuhauf Corp.*, 13 F.3d 1516, 1521 (11th Cir. 1994) ("[i]t is the law of this Circuit that we are bound by a prior panel's decision except to the extent it is altered by a supervening Supreme Court decision"); *Humane Society* v. *EPA*, 790 F.2d 106, 111 n.32 (D.C. Cir. 1986) ("[a]s a panel, we are bound by prior decisions of this court"); *General Dynamics Corp.* v. *United States*, 773 F.2d 1224, 1225 n.2 (Fed. Cir. 1985) ("a panel of this court is bound by prior precedential decisions unless and until overturned"), *cert. denied*, 476 U.S. 1181 (1986).

[11] 1st Cir. R. 35.1; 3d Cir. R. Addendum A R. 9.2; 4th Cir. R. 35; 5th Cir. R. 35.2.2; 6th Cir. R. Addendum II R. 20.8; 7th Cir. R. Practitioner's Handbook XXV (2); 8th Cir. R. 35A; 9th Cir. R. 35-1; 10th Cir. R. LR35.2.2; 11th Cir. R. 35-6; D.C. Cir. R. 35(c); Fed. Cir. R. 35(b); and Fed. R. App. P. 35(a).

erning the grant of certiorari specifically note the special importance the Court gives to resolving decisional conflicts between the circuits.[12] Third, Congress itself is free to intervene and amend the underlying law and to clarify its intent.[13] The Eleventh Circuit is ill served by adopting an alternative mechanism for resolving interpretative conflicts by revisiting and even rejecting its prior statutory interpretations. Litigants and lower courts, both in the Eleventh Circuit and elsewhere, are entitled to a clearer set of guidelines in determining when prior panel opinions will be respected and when they will be discarded. Only this Court can provide the necessary guidance and therefore it should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Variable Annuity Life Ins. Co.* v. *Clarke*, 998 F.2d 1295 (5th Cir. 1993), *cert. granted sub nom.*, 62 U.S.L.W. 3707 (U.S. June 6, 1994)

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[12] S. Ct. R. 10.1(a).

[13] *See, eg., Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989).